SUPREME COURT U. S.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1964

No. 438

WINSTON P. BOYER and GEORGE T. BOYER,
Appellants,

v.

RICHARD L. ELKINS and JAMES A. BULLOCK,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF COLORADO

JURISDICTIONAL STATEMENT

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ON APPEAL FROM THE SUPREME COURT OF THE STATE OF COLORADO

JURISDICTIONAL STATEMENT

Appellants appeal from the decision of the Supreme Court of the State of Colorado which became final on April 6, 1964, affirming the judgments of the District Court of the City and County of Denver, State of Colorado, and submit this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

OPINION BELOW

The decision of the Supreme Court of Colorado is reported in 16 Colorado Advance Sheets, No, 13, p. 239, and 390 P.2d 460. The order of that court denying the Petition for Rehearing is reported at 16 Colorado Advance Sheets, No. 15, p. 268. The opinion of the Supreme Court of Colorado, the order denying the Motion for Rehearing and the judgments of the District Court in and for the City and County of Denver are attached hereto as Appendix A.

JURISDICTION

This suit was brought to recover actual and exemplary damages from, and body judgments against, the appellants. The decision of the Supreme Court of the State of Colorado, affirming the judgments of the trial court, was entered on March 9, 1964, and the order denying the Petition for Rehearing was entered April 6, 1964. The Notice of Appeal was filed in that court on July 2, 1964. The jurisdiction of the Supreme Court of the United States to review this decision on appeal is conferred by Title 28, United States Code, Section 1257 (2). The following cases sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this action:

Mapp vs. Ohio, 367 U.S. 643; *Wolf vs. Colorado*, 338 U.S. 25; *Cramp vs. Board of Instruction*, 368 U.S. 278; *Connally vs. General Construction Company*, 269 U.S. 385; *Lanzetta vs. New Jersey*, 306 U.S. 451; and *Hartford Steam Boilet Inspection and Insurance Company vs. Harrison*, 301 U.S. 459.

STATUTES INVOLVED

The statutes, ordinance and rule involved are:

Chapter 39, Article 2, Section 20, Volume 8, p. 567 of the Colorado Revised Statutes (Permanent Supplement):

> "Arrests without warrants.— Any provision in this chapter prior to the effective date of this section to the contrary notwithstanding, an arrest may be made by an officer or by a private person without warrant, for a criminal offense committed in his presence; and by an officer, when a criminal offense has in fact been committed, and he has reasonable ground for believing that the person to be arrested has committed it."

Section 211:1-2, p. 124 of the Revised Municipal Code of the City and County of Denver, State of Colorado:

> "They [police officers] shall have power to arrest all persons found in the act of violating any law or ordinance or aiding or abetting in any such violation, and shall arrest any person found under circumstances which would warrant a reasonable man in believing that such person had committed or is about to commit a crime."

Chapter 77, Article 9, Section 3, Volume 4, p. 96 of the Colorado Revised Statutes, 1953:

> "Body execution in tort, when.— In any civil action in any court of record or before any justice of the peace, where it shall appear from the summons and other papers in the cause, that the action is founded upon tort, and upon trial of the cause the finding shall be in favor of the plaintiff, and the verdict of

the jury or the finding of the court, if tried without a jury, shall state that in committing the tort complained of, any one or more of the defendants were guilty of either malice, fraud, willful deceit or negligence consisting of a reckless or willful disregard of the rights or safety of others, then the plaintiff may have execution as provided in this article against the body of any defendant against whom such finding was had or any judgment rendered on any such finding. In no case shall an execution issue against the body of a person when the person shall have been convicted in a criminal prosecution for the same wrong."

Rule 101 (a) of the Colorado Rules of Civil Procedure, Volume 1, p. 80 of the Colorado Revised Statutes:

"(a) Body Execution. In any civil action where it shall appear from the summons and other papers that the action is founded upon tort, and upon trial a verdict or finding in favor of the plaintiff shall state that the defendant was guilty of either malice, fraud, wilful deceit or negligence consisting of a reckless or wilful disregard of the rights or safety of others, then the plaintiff may have execution against the body of any defendant against whom such verdict or finding was had, provided that in no case shall such execution issue when the defendant shall have been convicted in a criminal prosecution for the same wrong."

QUESTIONS PRESENTED

1. Whether a state statute or municipal ordinance which authorizes a police officer to seize and arrest a person without a warrant of arrest for the alleged commission of a misdemeanor committed out of the presence of the arresting officer is repugnant to and in violation of the Fourth Amendment and the Fourteenth Amendment to the Constitution of the United States.

2. Whether a state statute or municipal ordinance which authorizes a police officer to seize and arrest a person without a warrant of arrest for the alleged commission of a misdemeanor committed out of the presence of the arresting officer (whether or not such misdemeanor has in fact been committed) is repugnant to and in violation of the Fourth Amendment and the Fourteenth Amendment to the Constitution of the United States.

3. Whether a state statute and municipal ordinance which authorizes arrests without warrants of arrest for the commission of a criminal offense, and which statute and ordinance fail to define a criminal offense, are not so vague and indefinite as to be repugnant to and in violation of the Fourth Amendment and the Fourteenth Amendment of the United States Constitution.

4. Whether a state statute and a court rule which permit a person acquitted in a criminal prosecution to be imprisoned for debt in a subsequent civil action for the same alleged wrong, when a person convicted in a criminal prosecution is granted immunity from imprisonment for debt thereby, deny the former due process of law and equal protection of the laws as guaranteed by the Fourteenth Amendment to the United States Constitution.

5. Whether a state statute and a court rule which permit a person to be imprisoned for a judgment debt, regardless of whether or not he may be able to pay such debt, are repugnant to and in violation of the Fourteenth Amendment to the United States Constitution.

STATEMENT OF THE CASE

The appellants (hereinafter referred to as the Boyers) were arrested without warrants of arrest at a restaurant known as the Tiffin Inn by the appellees, two Denver police officers, who had been summoned to the restaurant after the Boyers had been in the establishment approximately thirty minutes. A struggle ensued during which the Boyers and the two police officers were injured. This action was brought by the police officers to recover for their injuries, and the Boyers counterclaimed against the officers to recover for their damages arising from false arrests and imprisonment as well as from assaults subsequently suffered (R. 8-12, and 21-25). It resulted in judgments being awarded to the police officers and against the Boyers for their actual damages, exemplary damages and for body execution (R. 174-185). The Boyers' position, as shown by their tendered instructions to the jury (R. 1274-1276), which were refused (R. 1276), and their objections (R. 1263-1264, 1266-1268) to instructions Numbers 1, 7-12 given to the jury (R. 1278-1281, 1284-1286), is that the arrests were unlawful and that they had a right to resist the arrests. The instructions given by the court told the jury that the attempt to arrest the Boyers was lawful (R. 1346, App. A, p. 25).

The trial court entered judgments that each of the police officers may have execution against the bodies of

each of the Boyers "for a period not to exceed one year, or until further order of court, or until the amount of the judgment has been paid." (R. 167, 179, 182, 185). Prior to the entry of the body judgments, the court was aware that the Boyers had each been charged with four different violations of the Municipal Ordinances of the City and County of Denver — drunkenness, disturbance, assault and battery, and resistance and interference — and that they had been tried for and acquitted of each of these charges in the Denver Municipal Court (Defendants' Exhibits 2 and 3, R. 1090, 1338, 1339).

How the Federal Questions are Presented.

The question involving the validity of the arrest statute, Chapter 39, Article 2, Section 20 of the Colorado Revised Statutes (Permanent Supplement) (hereinafter referred to as C.R.S. 39-2-20) first arose when the Boyers' counsel, during the course of the trial, objected to the admission of testimony of an employee of the restaurant as to what he told the police officers, when they had just arrived, concerning the prior conduct and actions of the Boyers. The objection was made on the grounds that if the statute was construed to permit an arrest for a misdemeanor not committed within the presence of the police officers, it was unconstitutional (R. 512-516). The court overruled the objection (R. 513, 516) and permitted the witness to testify that he told the police officers what he had seen and what he had been told by others at the scene concerning the prior conduct of the Boyers (R. 516). The actual conversation, which was not heard by the Boyers, was not related by the witness at the trial.

The repugnancy to the United States Constitution of

the arrest was again presented to the trial court in the Boyers' Amended Motion for New Trial (R. 215). The motion was denied (R. 222). The validity of the arrest was presented to the Colorado Supreme Court (R. 1345), and that court found "the attempted arrest of the defendants [Boyers] was altogether lawful" (R. 1348, App. A, p. 27). The repugnancy of the arrest statute, and the ordinance, to the Fourteenth Amendment to the United States Constitution was presented again to the Colorado Supreme Court in appellants' Petition for Rehearing (R. 1355-1357, App. B hereto). The petition was denied (R. 1359).

The repugnancy to the United States Constitution of the body judgment statute, Chapter 77, Article 9, Section 3 of the Colorado Revised Statutes, and the rule, Rule 101 (a) of the Colorado Rules of Civil Procedure (hereinafter referred to as C.R.S. 77-9-3, and Rule 101 (a) C.R.C.P.) was presented to the trial court in the Boyers' Amended Motion for New Trial (R. 215), which was denied (R. 222), and was presented to the Colorado Supreme Court both on appeal (R. 1350) and as part of the Petition for Rehearing (R. 1357, App. B). The Supreme Court held that the statute and the rule are constitutional and do not "offend the equal protection clause of the United States constitution" (R. 1352, App. A, p. 30). It denied the Petition for Rehearing (R. 1359).

THE QUESTIONS ARE SUBSTANTIAL

A. *The Invalidity of the Arrest Statute and Ordinance.*

The issues involved in the arrest statutes have occasion to arise daily and in great numbers throughout the United States. The powers conferred on police to arrest without warrant should be restrained within such boundaries as are consistent with the rights of private citizens in the security of their persons. The power to arrest without warrant, unless it is confined within clearly-prescribed limitations, could act to nullify rights now presumably guaranteed to persons by the Constitution of the United States. The power to arrest without regard to the actual commission of a misdemeanor or felony is in conflict with accepted standards of justice. These powers of arrest could be additionally abused by a failure adequately to define the offense for which arrest can be made without a warrant.

The arrest statute and ordinance are in conflict with the common law in effect at the time that the Fourth Amendment to the Constitution was adopted, as well as in conflict with federal case law and a good number of state decisions.

The trial court refused the instructions of these appellants (R. 1276) which were to the effect that the appellants could use reasonable force to resist an unlawful arrest, Instruction Number 5, R. 1275-1276), that a police officer may not arrest without justification (Instruction Number 7, R. 1276), and that ". . . a police officer cannot lawfully arrest one for the violation of a city ordinance

not committed in his presence without a warrant of arrest." (Intruction Number 8, R. 1276).

Instead, the trial court instructed the jury (Instructions Numbered 7, 8, 9 and 10, R. 1284-1286) that in making the arrests the appellees could use all reasonable force necessary in making the arrests and that if the appellants resisted the arrests and assaulted the officers in doing so, the arresting officers would be entitled to damages.

The Colorado Supreme Court, in applying that part of the arrest statute which provides that an arrest may be made without warrant "when a criminal offense has in fact been committed, and he has reasonable ground for believing that the person to be arrested has committed it", held that the arrests were lawful. (R. 1347, 1348).

In applying and upholding the arrest statute, the trial court and the Supreme Court took positions entirely in conflict with well-established law. The law was described by this Court in the case of *Carroll v. United States*, 267 U.S. 132 where this Court said:

> "The usual rule is that a police officer may arrest without warrant one believed by the officer upon reasonable cause to have been guilty of a felony, and that he may only arrest without a warrant one guilty of a misdemeanor if committed in his presence." pp. 156, 157.

This rule has also been recognized by this Court in *Kurtz v. Moffitt*, 115 U.S. 487, 498-499; *Elk v. United States*, 177 U.S. 529, 534. In the *Elk* case, as in this case, the appellant had not been permitted to question the legality of

his arrest. In setting aside the action of the lower court, this Court stated:

> "And yet the charge presented the plaintiff in error to the jury as one having no right to make any resistance to an arrest by these officers, although he had been guilty of no offense, and it gave the jury to understand that the officers, in making the attempt, had the right to use all necessary force to overcome any and all opposition that might be made to the arrest . . . ., the jury were informed that the policemen had the right to use all necessary force to arrest him, and that he had no right to resist." p. 537.

This rule as to arrest established in the common law, 4 Blackstone Comm. 289, and generally accepted to this date, is recognized as being part of the Fourth Amendment. (See the dissenting opinion in *Trupiano v. United States*, 334 U.S. 699, 713.) The application of the Fourth Amendment to cases of arrest, search and seizure has long been recognized. See *Rios v. United States*, 364 U.S. 253, 261; *Elkins v. United States*, 364 U.S. 206, 213; *Wolf v. Colorado*, 338 U.S. 25, 27-28.

The right of these appellants to seek the aid of this Court is based upon the Fourth and Fourteenth Amendments to the Constitution of the United States. That jurisdiction lies in this Court has been recognized in *Mapp v. Ohio*, 367 U.S. 643. This Court held in the *Mapp* case:

> "Having once recognized that the right to privacy embodied in the Fourth Amendment is enforceable against the States, and that the right to be secure against rude invasions of privacy by state officers is, therefore, constitutional in origin, we can no

longer permit that right to remain an empty promise. Because it is enforceable in the same manner and to the like effect as other basic rights secured by the Due Process Clause, we can no longer permit it to be revocable at the whim of any police officer who, in the name of law enforcement itself, chooses to suspend its enjoyment." p. 660.

State courts have held the above position as to the law of arrest to be correct and in so doing declared that arrest statutes comparable to the ones here in question are or would be unconstitutional and in violation of constitutional provisions pertaining to the "right of the people to be secure in their persons and property against unreasonable searches and seizures . . ." *In re Kellam*, 55 Kans. 700, 703, 41 Pac. 960. See also *People v. Haug*, 68 Mich. 557, 37 N.W. 21; *Pinkerton v. Verberg*, 78 Mich. 573, 44 N.W. 579; *Ex Parte Rhodes*, 202 Ala. 68, 79 So. 462, 1 A.L.R. 568; *Adair v. Williams*, 24 Ariz. 422, 210 Pac. 853; *Orick v. State*, 140 Miss. 184, 105 So. 465, 41 A.L.R. 1129; *State v. Govan*, Sup. Ct. N.D., 123 N.W.2d 110.

A Kansas law which permitted an arrest for a petty offense without a warrant was denounced, having long ago received judicial condemnation:

"It is, in effect, a revival of the odious general warrants, which placed the liberty of every man in the hands of every petty officer, and which long ago received judicial condemnation. To prevent their use and the exercise of such arbitrary power at the discretion of an officer, 'it has not been deemed unwise to repeat in the state constitutions, as well as in the constitution of the United States, the principles al-

> ready settled in the common law upon this vital point in civil liberty.' Cooley, Const. Lim. 364, and notes." *In re Kellam, at* 41 Pac. 961.

The evil of a statute that permits an arrest for a petty offense without a warrant is brought out in *Pinkerton v. Verberg* at 44 N.W. 582-583:

> "If persons can be restrained of their liberty, and assaulted, and imprisoned, under such circumstances, without complaint or warrant, then there is no limit to the power of a police officer.
>
> "Any law which would place the keeping and safe conduct of another in the hands of even a conservator of the peace, unless for some breach of the peace committed in his presence, or upon suspicion of felony, would be most oppressive and unjust, and destroy all the rights which our constitution guaranties. These are rights which existed long before our constitution, and we have taken just pride in their maintenance, making them a part of the fundamental law of the land . . . . No more dangerous doctrine could be laid down."

The vagueness of the statute and ordinance in the instant case are also repugnant to the Due Process Clause. The statute permits arrests without warrant for the commission of a "criminal offense". The ordinance is also repugnant to the Due Process Clause in authorizing arrests of persons who have committed "a crime." The indefiniteness and vagueness of these provisions, in effect, leave the matter to the arresting officer as to what a "criminal offense" is or what a "crime" is. The vice of this indefiniteness and vagueness is compounded by giv-

ing the arresting officer immunity for his wrongful acts, as was done in the case at hand.

This Court has accepted jurisdiction in appeals involving indefiniteness and vagueness of state statutes involving criminal procedures.

One of the most recent cases in which this Court took jurisdiction was *Cramp v. Board of Instruction*, 368 U.S. 278. Some of the other cases are: *Connally v. General Construction Co.*, 269 U.S. 385; and *Lanzetta v. New Jersey*, 306 U.S. 451. In the instant case, as in the case of *Cramp v. Board of Instruction*:

> "The vice of unconstitutional vagueness is further aggravated where, as here, the statute in question operates to inhibit the exercise of individual freedoms affirmatively protected by the Constitution." p. 287.

B. *The Invalidity of the Body Judgment Statute and Rule.*

The body judgment statute and rule, C.R.S. 77-9-3, and Rule 101 (a), C.R.C.P., as interpreted by the Colorado Supreme Court in this action, distinguishes between those convicted in criminal proceedings and those who are acquitted. The former are granted immunity from body execution in the subsequent civil action, and the latter are not granted such immunity. The Boyers, in their appeal to the Colorado Supreme Court, urged that this distinction denied them equal protection of the laws, as guaranteed them by the United States Constitution (R. 1350). That court held that "[T]he distinction drawn by the legislative enactment, and by Rule 101 (a), between one who has been convicted of a criminal offense and one who has

been acquitted . . . . is reasonable and does not offend the equal protection clause of the United States constitution." (R. 1352).

The decision by the highest court of the state, holding that a classification made in a state statute does not deny the equal protection of the laws, as guaranteed by the Fourteenth Amendment to the United States Constitution, may be reviewed by the United States Supreme Court on direct appeal. *Hartford Steam Boiler Inspection and Insurance Company v. Harrison*, 301 U.S. 459.

The body judgment statute, as interpreted by the Colorado Supreme Court in this case, strikes at the very heart of accepted standards of justice. It punishes those found innocent and grants immunity to those found guilty of criminal acts.

The statutory classification "must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis." *Gulf, Colorado & Santa Fe Ry. Company v. Ellis*, 165 U.S. 150, 155. "Discriminations are not to be supported by mere fanciful conjecture. . . . They cannot stand as reasonable if they offend the plain standards of common sense." *Hartford Steam Boiler Inspection and Insurance Company v. Harrison, supra*, at 462.

The purpose of the statute, according to the Colorado Supreme Court, is to aid the judgment creditor to collect on the judgment, *Hershey v. People*, 91 Colo. 113, 12 P.2d 345, and to prevent one convicted of a crime from suffering a second "punishment" (R. 1352, App. A, p. 30).

It offends "the plain standards of common sense" to believe that one convicted of a crime is more apt to pay a judgment in a civil action than one who has been acquitted. The opposite in fact may be true, because one punished by fine or imprisonment is less likely to have assets to satisfy the civil judgment.

If the purpose of the statute, as suggested by the Colorado Supreme Court in the instant case, is also to punish the wrongdoer, then the fact that the wrongdoer is once acquitted of the crime should not be a condition on which he may be imprisoned. The result of this statutory classification between those acquitted and those found guilty can only encourage those charged with misdemeanors to forego their right to protest their innocence in the criminal action in fear that they may be later imprisoned in a civil action. An Illinois statute which granted immunity from body judgment to those who confessed judgment but did not grant such immunity to those who suffered an adverse judgment after a trial was held to deny equal protection of the laws, *Sturges & Burn Manufacturing Company v. Pastel*, 301 Ill. 253, 133 N.E. 762. The court stated at 133 N.E. 764:

> ". . . There is no reasonable basis for such discrimination. There is no reason why a defendant who has had a jury trial and has been unsuccessful in his defense should be subject to imprisonment for payment of the judgment, and another defendant in exactly similar circumstances who has defaulted or confessed judgment for an exactly similar liability should be released from imprisonment. . . . The distinction is arbitrary and without reason. A defendant who demands a jury trial ought not to enjoy such right under penalty of imprisonment, if he fails to make good his

defense. The statute violates the constitutional provisions in regard to due process and equal protection of the laws."

Similarly, under the Colorado statute, one who defends himself in the criminal proceedings ought not be made to enjoy such right under penalty of possible imprisonment (in a civil action) if he makes good his defense and is acquitted.

The statute further discriminates between one who is able to pay the judgment and one who is not. The former, by paying the judgment, is immune from imprisonment; the latter, although he may deliver up all his estate, if it is insufficient, is still subject to imprisonment.[1] This imprisonment is not an alternative to payment because the debt is not satisfied by serving a term in prison.[2] Although each, the wealthy and the poor, have committed the same wrongful act, one by reason of his wealth is free from jail; the other is not.

In this action, George Boyer has been able to post a bond that assures his freedom, in the event this appeal is unsuccessful, but Winston Boyer, who has not posted a bond, faces imprisonment for one year. Yet both George and Winston Boyer have been tried together for the same alleged wrongs, and have suffered similar judgments. The law permits George Boyer to buy his freedom and escape

[1]Chapter 77, Article 8, Section 4 of the Colorado Revised Statutes and Rule 101 (b) of the Colorado Rules of Civil Procedure provide in part: ". . . No such execution shall issue if the amount of the judgment shall have been paid, and any person committed to jail by such process shall be immediately released upon the payment of the judgment."

[2]Colorado Revised Statutes, Chapter 77, Article 9, Section 5 and Rule 101 (c) of the Colorado Rules of Civil Procedure: ". . . judgment shall not be satisfied in whole or in part by any such imprisonment."

punishment, but Winston Boyer, who has not bought or cannot buy his freedom, may be imprisoned.

In Meaden v. W. J. Anderson Corp., 301 Ill. App. 390, 23 N.E. 2d 74, it was held that no one should be imprisoned for failure to pay money unless the evidence clearly shows that he has the power to pay it or had the money and wrongfully disposed of it. The Colorado statute and rule provide no such test of ability to pay.

Not only does the body judgment statute and rule encourage one charged with a petty offense to plead guilty in a criminal prosecution, but it places a price tag on obtaining justice in the criminal proceeding. Those who have the ability to pay a judgment in a subsequent civil action have nothing to fear in defending the criminal prosecution, but those who do not have such financial ability may protest their innocence in the criminal proceeding at the risk of imprisonment if they are successful. A law which discriminates on account of financial ability of the accused denies equal protection of the laws. *cf. Griffin v. People of the State of Illinois*, 351 U.S. 12.

The Boyers previously had been placed in jeopardy in the criminal prosecution, and were subject to punishment if convicted as a result thereof. Now they are subject to punishment again. Although the second action is civil, the body judgment statute, as interpreted by the Colorado Supreme Court in the instant action (R. 1352, App. A, p. 30), imposes punishment for a criminal act. To be thus placed twice in jeopardy is contrary to fair procedure guaranteed by the Due Process Clause of the Fourteenth Amendment. The constitutional guarantee of the Fifth Amendment against double jeopardy should supply the

standard for state actions as well as federal. See Justice Douglas's dissenting opinion in *Hoag v. State of New Jersey*, 356 U.S. 464, 477.

CONCLUSION

It is submitted that the arrest statute (C.R.S. 39-2-20) and Section 211.1-2 of the Revised Municipal Code of the City and County of Denver, State of Colorado, are repugnant to the Fourth and Fourteenth Amendments to the Constitution of the United States and that the body judgment statute and rule (C.R.S. 77-9-3, Rule 101 (a), C.R.C.P.) are repugnant to the Fourteenth Amendment of the Constitution of the United States. We believe that the questions presented by this appeal are substantial and are of public importance.

We respectfully urge that this Honorable Court take jurisdiction, and grant the appeal herein.

Respectfully submitted,

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APPENDIX A

No. 20397

IN THE SUPREME COURT OF THE STATE OF COLORADO

WINSTON P. BOYER and GEORGE T. BOYER,
Plaintiffs in Error,
vs.
RICHARD L. ELKINS and JAMES A. BULLOCK,
Defendants in Error.

Error to the District Court of the City and County of Denver

Honorable Henry E. Santo, Judge.

[March 9, 1964]

EN BANC

JUDGMENT AFFIRMED

MR. JUSTICE MOORE delivered the opinion of the court.

We will refer to the parties by name, or as they appeared in the trial court where defendants in error were plaintiffs and plaintiffs in error were defendants.

The action was brought by plaintiffs to recover damages, actual and exemplary, resulting from an alleged aggravated assault and battery upon them by defendants. Numerous other parties were drawn into the case by defendants whose third party complaint sought to recover damages against plaintiffs and others allegedly responsible for what they asserted was an unwarranted assault upon them, unlawful arrest, false imprisonment of their persons, and malicious prosecution. None of the third party defendants is involved in this writ of error.

After issues were framed the case was tried to a jury and verdicts were returned in favor of plaintiffs, aggregating $45,000.00. The jury by its verdicts further found that in committing the tort complained of defendants were guilty of malice, insult, and a reckless and wanton disregard of the rights and feelings of the plaintiffs. Upon this finding the court entered judgment for the issuance of execution against the body of each of the defendants. The record is voluminous, consisting of 3642 folios, all of which has been carefully examined and analyzed with relation to the grounds which have been urged for reversal of the judgment.

We do not attempt in this opinion to give a detailed statement of the evidence introduced at the trial. A general statement with regard to the nature of the action and events out of which it arose will suffice to give meaning to the points argued by counsel for defendants.

On the morning of March 10, 1958, Winston P. Boyer, who resides in Moab, Utah, together with his brother George T. Boyer and their uncle Roy E. Spicer, traveled from Denver to the Air Force Academy near Colorado Springs, Colorado. There by prearrangement they met a

truck driver who had been engaged to do some hauling for them. Certain material was selected at the Academy which was to be used by Winston Boyer in a contemplated house building project at Moab, Utah. These four men spent the day in selecting the material which they desired and loading it on the truck. Their labors were completed late in the afternoon, after which they all proceeded from the Academy to a weighing station, where they were delayed by authorities because of some overloading of the truck. The truck finally cleared the weighing station at about 7:00 P.M. The Boyers and Spicer then proceeded toward Denver via the Valley Highway in the Boyer sedan with George Boyer driving, and, arriving at Castle Rock they stopped for dinner at a restaurant with a connecting bar, at which time, before and during their meal, Winston Boyer and Spicer each consumed three drinks of whiskey. George Boyer had two similar drinks before dinner, which he consumed within a period of fifteen minutes. Winston and Spicer consumed their drinks within forty minutes. They had arrived at Castle Rock at 8:00 P.M. and left for Denver at 9:30 P.M. They proceeded from Castle Rock toward Denver until they arrived at a tavern called the "Flame" where they stopped and each consumed an additional quantity of whiskey. The party then drove about twelve miles to Writer's Manor on South Colorado boulevard in Denver where they arrived at approximately 11:30 P.M. Spicer wanted to cash a check but was disappointed in doing so because of the absence of a party he knew who he expected would approve his check. The three of them then proceeded into the bar where George admittedly attempted twice to serve himself by reaching over the bar in an effort to grab a bottle of liquor. George admits that on one such attempt he did in fact succeed in placing a small quantity of liquor in his coffee cup. Ac-

cording to the testimony of the bartender there were three attempts to take whiskey from behind the bar, and on each of the occasions George succeeded in getting an ounce or an ounce-and one-half of whiskey.

Winston, George and Spicer were sitting at the west end of the bar which was tended by a Mr. Woodrow Wilson. Coffee was first served to the Boyers and a whiskey highball to Spicer. After the Boyers consumed their coffee George reached over the bar for a bottle of liquor and according to Wilson began pouring some of its contents into the cup. The taking of any liquor at that time was disputed by the Boyers. Wilson testified that George took about one and one-half ounces of liquor. It is the undisputed testimony of George that the "bartender came over and took the bottle from me" and said "Leave the liquor alone." The bartender replaced the bottle in the well back of the bar from where it was taken. George then left the bar and went to the coffee shop for more coffee. After consuming the second cup of coffee he again reached over the bar and took the same bottle. He admits that at that time he took a small amount of liquor. Again the bartender took the bottle away from him and according to Wilson he said to him, "I want you to leave the liquor alone." Wilson then reported those incidents to Carl Harthun the other bartender who was also in charge of the place. Harthun exchanged stations with Wilson. Harthun again observed George reaching for the bottle and saw him again pour whiskey into his coffee cup. The Boyers deny taking any whiskey at that time; at any rate Harthun again took the bottle from George and told him: "We serve the customers, the customers don't serve themselves." George then left for another cup of coffee, followed by Harthun who said, "I wish that you and your

party would leave.". George's answer, according to Harthun, was: "You damn bartenders won't give us any service, and we have to serve ourselves." Harthun then went into the lobby and telephoned for police protection.

After the conversation with Harthun, George again left the bar for a fourth cup of coffee and upon his return noticed two policemen talking with Harthun. These police officers were the plaintiffs Elkins and Bullock and were in full uniform. They had a five minute conference with Harthun who related what had happened. The record shows that Elkins and Bullock then approached the Boyers; that they informed them that the management wanted them to leave and asked them to finish their coffee and go. The remarks of George and Winston to the officers can well be characterized as "smart-alecky", insolent and somewhat defiant, and quite within the realm of what one might hear from an inebriate. During this time, although denied by the Boyers, one of them swung at Elkins, and Elkins started to remove them from the place, at which time the Boyers demanded to know what the charges were. The reply of the officers was that there were no charges as yet but there would be unless they left willingly. George Boyer had to be handcuffed, and ultimately, after a fight in which Elkins was kicked into unconsciousness and Bullock was knocked into insensibility, the two Boyers were subdued upon the arrival and with the help of several other policemen. One of the Boyers was placed in the patrol car and the other in another police cruiser and taken to the police station. There is an abundance of testimony that both Boyers were inebriated and fighting drunk, that they were loud, noisy, profane and were disturbing the peace in a public place. Elkins and Bullock were taken to the hospital, both with serious injuries.

The argument for reversal of the judgments is presented under several captions as follows:

I. "The trial court erred in failing to submit to the jury the issues of whether or not officers Elkins and Bullock lawfully arrested George and Winston Boyer and whether or not George and Winston Boyer had a right to resist such arrests.

II. "The damage verdicts returned by the jury were excessive and unreasonable in relation to the alleged injuries incurred by the plaintiffs, were unsupported by the evidence, and bore no relation to *proximate cause*.

III. "The defendants were deprived of a fair trial by reason of improper opening statements on the part of plaintiffs' counsel."

Point I above is grounded on the refusal of the trial court to give instructions tendered by the defendants, based upon the proposition that the plaintiff police officers were engaged in making an unlawful arrest of the defendants and that they had a right to resist the unlawful conduct of the plaintiffs with such force as was necessary to prevent the illegal arrest contemplated by the plaintiffs.

The instructions given by the court, in effect, told the jury that the attempt to arrest the defendants was lawful; and the question as to whether the plaintiffs used more force than was necessary to accomplish their purpose was given to the jury for determination under the following instruction (among others of similar import):

"The Court instructs the jury that if you do not find from a preponderance of the evidence that in

effecting the arrest of the defendants, Winston P. Boyer and George T. Boyer, either or both of them, the plaintiffs, Richard L. Elkins and James A. Bullock, either or both of them, used more physical force than was reasonably necessary under all of the circumstances of the case to effect the arrest, then and in that event, you are instructed that the defendants, Winston P. Boyer and George T. Boyer, either or both of them, cannot recover upon their counterclaim against the plaintiffs, Richard L. Elkins and James A. Bullock, either or both of them."

We have examined all the instructions which were tendered by defendants and denied by the court, and find no error. There was no sufficient evidence received upon the trial to warrant the giving of these instructions, assuming arguendo, that they were correct statements of legal principles applicable to a case in which the evidence would justify their application.

C.R.S. '53, 39-2-20 (Permanent Supplement) enacted in 1955, provides:

> "Any provision of this chapter prior to the effective date of this section to the contrary notwithstanding, an arrest may be made by an officer or by a private person without a warrant, for a criminal offense committed in his presence; *and by an officer, when a criminal offense has in fact been committed, and he has reasonable ground for believing that the person to be arrested has committed it.*" (emphasis supplied.)

Section 211.1-2 of the Revised Municipal Code of the City and County of Denver provides that police officers

> "• • • shall have the power to arrest all persons

found in the act of violating any law or ordinance or aiding or abetting in any such violation, and shall arrest any person under circumstances which would warrant a reasonable man in believing that such person had committed or is about to commit a crime."

We have held in recent decisions that the violation of municipal ordinances is a criminal offense in this State. *Canon City v. Morris*, 137 Colo. 169, 323 P.(2d) 614; *Geer v. Alaniz*, 138 Colo. 177, 331 P.(2d) 260; *Zerobnick v. Denver*, 139 Colo. 139, 337 P.(2d) 11.

In the instant case there is no question as to whether an offense had been committed. The degree thereof is all that is sought to be minimized by the defendants. There was an abundance of evidence that the defendants were very much under the influence of liquor, that they were "fighting drunk". Their conduct was such as to require the manager in charge of a reputable place of business to call for police protection. There isn't the slightest competent evidence in this record which would deprive the plaintiffs of the protection afforded to them by the statute and the ordinance hereinabove quoted. We hold, under the facts disclosed by this record, that as a matter of law the defendants had committed a criminal offense or offenses, and that as a matter of law the plaintiffs had reasonable ground for believing that the defendants had committed such offense or offenses. The attempted arrest of the defendants was altogether lawful and the plaintiffs would have been derelict in the performance of their duty had they refused to act. There was overwhelming evidence that the plaintiffs did not use more force than was necessary to effect the arrest.

The argument that the damages are excessive is with-

out merit. The judgments entered in favor of plaintiff Elkins were as follows:

Against Winston Boyer $10,000.00 actual, and $2,500.00 exemplary damages, and against George Boyer actual damages in the amount of $15,000.00 and exemplary damages in the amount of $2,500.00.

The judgments in favor of plaintiff Bullock were as follows:

Against Winston Boyer, $5,000.00 actual and $2,500.00 exemplary damages, and against George Boyer $5,000.00 actual and $2,500.00 exemplary damages.

The jury was properly instructed on the subject of damages, and the amount to be awarded is a matter very largely within the discretion of the jury. Unless a clear abuse of discretion is shown, this court will not interfere with the finding of a jury in such circumstances. *City of Pueblo, et al. v. Ratliff*, 137 Colo. 468, 327 P.(2d) 270.

There is nothing in this record to warrant discussion of the contention that the plaintiffs' attorney made improper comments in his opening statement to the jury. No objection was made to any such statement at the time of trial, and the point was urged for the first time in an amended motion for a new trial. Present counsel for defendants, who did not participate in the trial, caused the amended motion for new trial to be filed in which the point was raised even though no objection was entered when the claimed prejudicial remarks were made. The alleged objectionable statements were of little significance, being conclusions drawn by the plaintiffs' attorney from facts he intended to prove. The attorney who represented

the defendants considered the statements to be lacking in prejudicial effect and made no objection thereto. The trial court instructed the jury that the statements of counsel were not evidence, and there is no showing whatever that any prejudice resulted to the defendants by reason thereof.

One further point urged for reversal is directed to the judgment authorizing the issuance of an execution against the body of each defendant. It was shown in evidence that the defendants were accused of violations of municipal ordinances based upon the facts hereinabove mentioned. A trial was had in the municipal court of Denver and the defendants were acquitted. It is conteaded that C.R.S. '53, 77-9-3 (the body judgment section of the statute) as applied to the defendants under the above factual situation, deprives them of equal protection of the law as guaranteed by the constitution of the United States. The statute provides that an execution shall not be issued against the body of any person when he "shall have been convicted in a criminal prosecution for the same wrong."

To like effect is R.C.P. Colo. 101 (a).

It is argued that C.R.S. '53, 77-9-3, and Rule 101 (a), C.R.C.P., provide that in no case may execution issue against the body of a person when the person "shall have been convicted in a criminal prosecution for the same wrong", and that ordinance violations prosecuted in the municipal court of Denver are "criminal proceedings" within the meaning of the statute and the rule.

It is further argued that:

"As applied to the circumstances here, C.R.S. '53,

77-9-3 and Rule 101 (a) make a distinction between a person that has been *convicted* of a criminal offense, and a person that has been *acquitted*. The statute and the rule provide that a person convicted of a criminal offense is immune from body execution, but a person acquitted of a criminal offense charge is denied this immunity. It is submitted that this differentiation between the convicted and the acquitted violates the equal protection clause of the Fourteenth Amendment of the United States Constitution.

"If a statute attempts to grant one class of persons a right not available to another class, the discrimination must not be arbitrary and must be based on some reasonable relationship to the lawful purpose sought to be obtained."

We cannot agree with this argument. The distinction drawn by the legislative enactment, and by Rule 101 (a), between one who has been convicted of a criminal offense and one who has been acquitted has a relationship to the purposes sought to be accomplished, and the classifications mentioned are not "supported by mere fanciful conjecture" as argued by counsel. The person who has been convicted and presumably punished by infliction of the penalty imposed by law, cannot be required to suffer a second "punishment" under the law governing execution against the body in civil actions. *Grant v. Gwyn*, 148 Colo. 56, 365 P. (2d) 256. The classification thus created is reasonable and does not offend the equal protection clause of the United States constitution.

The judgments are affirmed.

MR. JUSTICE PRINGLE not participating.

Order Denying Petition for Rehearing

The court having considered the motion of plaintiffs in error for rehearing in said cause, and being sufficiently advised in the premises, it is this day ordered that said motion be, and the same hereby is, denied.
By the Court. April 6, 1964.

Judgments of the District Court of the City and County of Denver.

The Court having this day ordered that judgment be entered herein *NUNC PRO TUNC* as of March 17, 1961 in favor of the plaintiff Richard L. Elkins and against the defendant Winston P. Boyer, on plaintiffs' Complaint, in accordance with the verdict of the jury heretofore entered, now therefore:

IT IS ORDERED, ADJUDGED AND DECREED by the Court that the plaintiff Richard L. Elkins, do have and recover of and from the defendant Winston P. Boyer, the sum of Ten Thousand Dollars ($10,000.00), his damages so by the jury assessed, together with interest;

And the jury further finding that the injury complained of was attended by a wanton and reckless disregard of the plaintiff's Richard L. Elkins, rights and feelings,

And the jury further finding that the injury complained of was attended by circumstances of malice,

IT IS ORDERED, ADJUDGED AND DECREED by the Court that the plaintiff Richard L. Elkins do have

and recover of and from the said defendant Winston P. Boyer, the sum of Two Thousand Five Hundred Dollars ($2,500.00), his exemplary damages so by the jury assessed; and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that the said plaintiff Richard E. Elkins may have execution against the body of said defendant, Winston P. Boyer, for a period not to exceed one year, or until the further order of the Court, or until the amount of the judgment has been paid.

IT IS FURTHER ORDERED by the Court that execution is stayed until April 24, 1961 at nine o'clock A.M.

The Court having this day ordered that judgment be entered herein *NUNC PRO TUNC* as of March 17, 1961 in favor of the plaintiff Richard L. Elkins and against the defendant George T. Boyer, on plaintiffs' Complaint, in accordance with the verdict of the jury heretofore entered, now therefore;

IT IS ORDERED, ADJUDGED AND DECREED BY THE COURT that the plaintiff Richard L. Elkins, do have and recover of and from the defendant George T. Boyer, the sum of Fifteen Thousand Dollars ($15,000.00), his damages so by the jury assessed, together with interest.

And the jury further finding that the injury complained of was attended by a wanton and reckless disregard of the plaintiff's Richard L. Elkins, rights and feelings,

And the jury further finding that the injury complained of was attended by circumstances of malice,

IT IS ORDERED, ADJUDGED AND DECREED by the Court that the plaintiff, Richard L. Elkins, do have and recover of and from the defendant George T. Boyer, the sum of Two Thousand Five Hundred Dollars ($2,500.00), his exemplary damages so by the jury assessed, together with his costs in this behalf laid out and expended, to be taxed; and have execution therefor.

IT IS FURTHER ORDERED by the Court that the plaintiff Richard E. Elkins may have execution against the body of said defendant George T. Boyer for a period not to exceed one year, or until the further order of the Court, or until the amount of the judgment has been paid.

IT IS FURTHER ORDERED by the Court that execution is stayed until April 24, 1961 at nine o'clock A.M.

The Court having this day ordered that judgment be entered herein *NUNC PRO TUNC* as of March 17, 1961 in favor of the plaintiff James A. Bullock and against the defendant Winston P. Boyer, on plaintiffs' Complaint, in accordance with the verdict of the jury heretofore entered, now therefore;

IT IS ORDERED, ADJUDGED AND DECREED by the Court that the plaintiff James A. Bullock, do have and recover of and from the defendant Winston P. Boyer, the sum of Five Thousand Dollars ($5,000.00), his damages so by the jury assessed, together with interest;

And the jury further finding that the injury complained of was attended by a wanton and reckless disre-

gard of the plaintiff's James A. Bullock, rights and feelings,

And the jury further finding that the injury complained of was attended by circumstances of malice,

IT IS ORDERED, ADJUDGED AND DECREED by the Court that the plaintiff James A. Bullock, do have and recover of and from the defendant Winston P. Boyer, the sum of Two Thousand Five Hundred Dollars ($2,500.-00), his exemplary damages so by the jury assessed, together with his costs in this behalf laid out and expended, to be taxed; and have execution therefor.

IT IS FURTHER ORDERED by the Court that the plaintiff James A. Bullock may have execution against the body of said defendant Winston P. Boyer for a period not to exceed one year, or until the further order of the Court, or until the amount of the judgment has been paid.

IT IS FURTHER ORDERED by the Court that execution is stayed until April 24, 1961 at nine o'clock A.M.

The Court having this day ordered that judgment be entered *NUNC PRO TUNC* as of March 17, 1961 in favor of the plaintiff James A. Bullock and against the defendant George T. Boyer, on plaintiffs' Complaint, in accordance with the verdict of the jury heretofore entered, now therefore;

IT IS ORDERED, ADJUDGED AND DECREED by the Court that the plaintiff James A. Bullock, do have

and recover of and from the defendant George T. Boyer, the sum of Five Thousand Dollars ($5,000.00), his damages bo (sic) by the jury assessed, together with interest;

And the jury further finding that the injury complained of was attended by a wanton and reckless disregard of the plaintiff's James A. Bullock, rigats and feelings,

And the jury further finding that the injury complained of was attended by circumstances of malice,

IT IS ORDERED, ADJUDGED AND DECREED by the Court that the plaintiff James A. Bullock, do have and recover of and from the defendant Winston P. Boyer, the sum of Two Thousand Five Hundred Dollars ($2,500.-00), his exemplary damages so by the jury assessed, together with his costs in this behalf laid out and expended, to be taxed; and have execution therefor.

IT IS FURTHER ORDERED by the Court that the plaintiff James A. Bullock may have execution against the body of said defendant George T. Boyer for a period not to exceed one year, or until the further order of the Court, or until the amount of the judgment has been paid.

IT IS FURTHER ORDERED by the Court that execution is stayed until April 24, 1961 at nine o'clock A.M.

APPENDIX B

No. 20397

IN THE
SUPREME COURT
OF THE
STATE OF COLORADO

WINSTON P. BOYER and
GEORGE T. BOYER,
Plaintiffs in Error,

vs.

RICHARD L. ELKINS and
JAMES A. BULLOCK,
Defendants in Error.

Error to the
District Court
of the City and County
of Denver

Honorable
Henry E. Santo,
Judge.

PETITION FOR REHEARING OF PLAINTIFFS IN ERROR

EN BANC

MR. JUSTICE MOORE wrote the opinion of the Court.

Plaintiffs in Error now address their Petition for Rehearing to this Court, having reference to the Court's opinion and judgment of March 9, 1964. It is respectfully asserted that the Court has overlooked or misapprehended the following points:

1. C.R.S. '53, 39-2-20 (Permanent Supplement) and Section 211.1-2 of the Revised Municipal Code of the City and County of Denver, as applied by the Honorable Court in support of its holding that the arrests were lawful, violate Sections 7 and 12 of Article II of the Constitution of Colorado, and the Fourteenth Amendment of the Constitution of the United States.

It appears that the Court has held in substance that a police officer lawfully may make an arrest without a warrant for a misdemeanor committed outside of his presence.

The Court's opinion does not expressly state the crime or crimes committed by the Boyers prior to their arrests. However, the crime or crimes contemplated must have been misdemeanors, presumably drunkenness or disturbance. (See Def. Exhs. 2 and 3, fols. 2859, 2919, 2921). These misdemeanors upon which the arrests were made did not occur in the presence of the arresting officers. As noted at page 6 of the Court's opinion, the arrests were made after the officers had a "five-minute conference with Harthun (the bartender) who related what had happened".

It has been held that an arrest for a misdemeanor committed outside the presence of an arresting officer, without a warrant, is a denial of due process of law. *Ex Parte Rhodes*, 202 Ala. 68, 79 So. 462 (1918), and constitutes an unreasonable search and seizure. *In re Kellam*, 55 Kan. 700, 41 Pac. 960 (1895), *Polk v. State*, 167 Miss. 506, 142 So. 105 (1932). See also *Carroll vs. U. S.*, 276 U. S. 132, 156, 157, 45 S. Ct. 280, 286 (1925).

The evidence concerning what occurred in the presence of the officers is in conflict. For example, the Boyers

deny swinging at the officers when asked to leave the establishment. (See page 6 of the Court's opinion).

It is respectfully submitted that, by eliminating from consideration what transpired outside the presence of the arresting officers, a different result will be reached on rehearing the point of whether or not the arrests were lawful.

In addition, neither C.R.S. '53, 39-2-20 (Perm. Supp.) nor Section 211.1-2 of the Revised Municipal Code of the City and County of Denver define a criminal offense. The said statute and code section are unconstitutional because they are indefinite and vague.

2. In the Court's opinion, the "reasonable ground" for believing that the Boyers had committed an offense is based substantially upon evidence of a five-minute conference between the arresting officers and one Harthun, a bartender, who purportedly related what had happened. (See page 6 of the Court's opinion). The Court has overlooked the fact that there is no evidence as to what Harthun *actually* related to the arresting officers. Therefore, the record is silent as to the "reasonable ground" upon which the officers based their arrest of the Boyers.

3. It is respectfully submitted that the Court has overlooked the true purpose of the body judgment statute and rule, C.R.S. '53, 77-9-3 and R.C.P. Colo. 101(a). The Court at page 14 of its opinion states in substance that the distinction between persons who have been acquitted of a crime and those that have been convicted is made to prevent a criminal from suffering a second punishment. The statute's purpose, however, is to aid the judgment

creditor to collect on the judgment, *Hershey v. People* 91 Colo. 113, 12 P.2d 345 (1932) and not to punish the acquitted criminal. The distinction between those acquitted and those convicted bears no reasonable relationship to collections of judgments.

The Colorado statute and Rule 101(a) on body execution should be considered void because of indefiniteness, as well as the fact that it violates the United States Constitution.

Respectfully submitted,

MODESITT AND SHAW

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GEORGE J. FRANCIS

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1964

No. 438

WINSTON P. BOYER and GEORGE T. BOYER,
Appellants,

v.

RICHARD L. ELKINS and JAMES A. BULLOCK,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF COLORADO

MOTION TO DISMISS AND BRIEF IN SUPPORT THEREOF

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1964

No.....

WINSTON P. BOYER and GEORGE T. BOYER,
Appellants,

v.

RICHARD L. ELKINS and JAMES A. BULLOCK,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF COLORADO

MOTION TO DISMISS

COME NOW the appellees, Richard L. Elkins and James A. Bullock, and respectfully move this Honorable Court, pursuant to the terms and provisions of Rule 16 of the Supreme Court Rules, to dismiss the appeal of Winston P. Boyer and George T. Boyer, appellants, from the judgment of the Supreme Court of Colorado, bottomed upon its *en banc* decision of March 9, 1964, as reported in 390 P.(2d) 460 (not yet reported in the Colorado reports); and as grounds therefor would show:

1. That on March 9, 1964, the Supreme Court of Colorado, by its *en banc* opinion, affirmed a judgment of the District Court of the City and County of Denver, State of Colorado, pursuant to a verdict of a jury, by virtue of which the appellees were awarded damages for personal injuries suffered as the result of an assault and battery committed upon them by the appellants while in the discharge of appellees' official duties as police officers of the City and County of Denver; that, in addition to the compensatory damages awarded, the jury verdict and judgment of the Trial Court based thereon included exemplary damages and, in accordance with Chapter 77, Article 9, Section 3, Volume 4, page 96, *Colorado Revised Statutes*, 1953, execution against the body of each of the appellants was ordered "for a period not to exceed one year or until further order of Court or until the amount of the judgment has been paid."

2. That, after the affirmance of the judgment, the appellants, pursuant to and in accordance with Rule 118 of the Colorado Rules of Civil Procedure (Volume 1, page 116, *Colorado Revised Statutes*, 1953), caused to be filed their joint Petition for Rehearing in the manner and form reproduced as Appendix "B" at pages 36 to 39 of the Jurisdictional Statement. On April 6, 1964, the Petition for Rehearing was denied, and the judgment became final.

3. That Notice of Appeal to this Court was duly and regularly filed with the Clerk of the Supreme Court of the State of Colorado on July 2 1964, by virtue of which the jurisdiction of this Court was sought to be invoked for review of the judgment of the State Court, under and pursuant to Title 28, *U.S.C.* 1257(2).

4. That, pursuant to Rule 15 of the Supreme Court

Rules, the Jurisdictional Statement of the appellants was served upon the appellees on August 27, 1964.

5. That said Jurisdictional Statement and the Record submitted *haec verba* demonstrates:

(a). That the appeal does not present a substantial federal question; but, on the contrary, the judgment of the State Court rests entirely upon an adequate and complete non-federal basis.

(b). That the purported federal question sought to be reviewed, as it relates to the constitutionality of the "arrest-without-warrant" statute of the State of Colorado and the ordinance of the City and County of Denver (Chapter 39; Article 2, Section 20, Volume 8, page 567, *Colorado Revised Statutes*, 1953, and Section 211.1-2, page 124 of the *Revised Municipal Code* of the City and County of Denver, reproduced at page 3 of the Jurisdictional Statement) was not timely, properly or adequately raised.

(c). That the constitutionality of the "arrest-without-warrant" statute and ordinance was not expressly passed on by the Supreme Court of Colorado.

6 That, with respect to the constitutional challenge to the "body execution" statute (Chapter 77, Article 9, Section 3, Volume 4, page 96, *Colorado Revised Statutes*, 1953, reproduced at pages 3 and 4 of the Jurisdictional Statement), this appeal is premature and does not, under the Record and circumstances of this particular case, raise any justiciable issue and for all intents and purposes is moot.

7. That the judgment of the Supreme Court of Colorado is bottomed solely, fully and conclusively upon a factual basis, to wit: An aggravated assault and battery, which presents a matter only of local concern, determined after a full, fair and complete trial of all of the issues presented by the pleadings, the evidence, and the pertinent rules of law pertaining within Colorado.

8. With respect to the allegations of Paragraph 5(a) and Paragraph 7 of this Motion to Dismiss, the factual basis in support thereof may be found succinctly stated by Mr. Justice Moore in the *en banc* decision of the Supreme Court of Colorado, reproduced as Appendix "A" in the Jurisdictional Statement, and particularly at pages 21 to 24, inclusive, thereof, and incorporated herein by reference.

9. With respect to the allegations of Paragraph 5(b) of this Motion to Dismiss, the factual basis in support thereof may again be found in the opinion of Mr. Justice Moore, reproduced as Appendix "A" in the Jurisdictional Statement, and particularly at pages 25 and 29 thereof, which, by reference, is incorporated herein. Further, neither the pleadings, which framed the issues to be tried, nor the appellants' motion and amended motion for new trial make any challenge whatsoever to the validity or constitutionality of the "arrest-without-warrant" statute and/or ordinance; that appellants failed to give the required notice of such challenge to the Attorney General of Colorado and/or the Mayor or City Attorney of the City of Denver, as is required by Rule 22 of the Rules of the District Court prevailing in and for the Second Judicial District (City and County of Denver), State of Colorado, reproduced as Appendix "1" to this Motion and

incorporated herein by reference; that the specific statute now challenged was used and employed by the appellants in their opening brief filed in the Supreme C urt of Colorado in support of their contentions, there made, that the legality of the arrest was solely a jury question upon conflicting evidence, as appears in their Summary of the Argument, contained at pages 31 and 32 of said brief, reproduced here as Appendix "2" and incorporated herein by reference; and that the challenge to the validity of the "arrest-without-warrant" statute and dinance was raised, for the first time, in paragraph No. 1 of appellants' Petition for Rehearing, reproduced as Appendix "B" in the Jurisdictional Statement and incorporated herein by reference.

10. With respect to the allegations of Paragraph 5(c) of this Motion to Dismiss, a physical examination of the opinion of the Supreme Court of Colorado, reproduced as Appendix "A" to appellants' Jurisdictional Statement, will reveal that the State Court did not expressly pass on the validity or the constitutionality of either the challenged "arrest-without-warrant" statute or ordinance.

11. With respect to the allegations of Paragraph 6 of this Motion to Dismiss, the Orders of Mr. Justice Byron R. White of May 8, 1964, reproduced herein as Appendixes "3" and "4" and incorporated herein by reference, are offered as supporting, factually, the prematureness and mootness of the challenge to the validity of the "body execution" statute (Chapter 77, Article 9, Section 3, *Colorado Revised Statutes*, 1953); that, pursuant to such Orders, George T. Boyer did post a good and sufficien bond with the Clerk of the Supreme Court of Colorado (after its app oval by the justices thereof), conditioned

upon the payment of the judgment which is the subject of this application for review (see admissions in Jurisdictional Statement at page 17). With respect to Winston P. Boyer, the record affirmatively establishes that he failed to file his "affidavit as to such inability" to provide the requisite bond; and, by reason of the premises, the Record is destitute of a showing of his inability to satisfy the judgment herein without application of the statute.

12. That the statutes and ordinance now the subject of challenge are in every respect valid and constitutional, as a proper exercise of the police powers of the State and Municipality.

Respectfully submitted,

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ARGUMENT AND BRIEF IN SUPPORT OF MOTION TO DISMISS

The argument that follows and the citation of authorities in support thereof will follow the same sequence as the grounds alleged, with their subdivisions encompassed within Paragraphs 5 to 12, inclusive, of the Motion to Dismiss.

I. THE APPEAL FAILS TO PRESENT A SUBSTANTIAL FEDERAL QUESTION.

It is now settled law that the Supreme Court of the United States lacks jurisdiction to review a decision of a State Supreme Court where, as here, the state decision may be justified on an adequate non-federal basis. *Ellis v Dixon*, 349 U.S. 458, 75 S.Ct. 850, 99 L.Ed. 1231; *Stembridge v. State of Georgia*, 343 U.S. 541, 547, 72 S.Ct. 834, 837, 96 L.Ed. 1130; *Lynch v. People of New York, et al.*, 293 U.S. 52, 54, 55 S.Ct. 16, 17, 79 L.Ed. 191; *Rescue Army, et al. v. Municipal Court of City of Los Angeles*, 331 U.S. 549, 67 S.Ct. 1409, 1420, 91 L.Ed. 1666.

The present challenge is to the validity of Colorado's "arrest-without-warrant" statute (Chapter 39, Article 2, Section 20, Volume 8, page 567 *Colorado Revised Statutes*, 1953), as well as t the municipal ordinance upon the same subject (Section 211.1-2, page 124 of the *Revised Municipal Code* of the City and County of Denver). A comparison of the pertinent state statute with the city ordinance reveals that the two are co-extensive in permitting arrests, by officers, for offenses committed in their presence. With respect to offenses committed out of their presence, the statute requires (a) that a "criminal of-

fense" has, in fact, been committed; and (b) that the arresting officer has "reasonable grounds for believing" that the person to be arrested has committed it, whereas the ordinance requires but one element — that the officer have reasonable grounds to believe that the person to be arrested has committed a crime.

It is now established that the violation of a municipal ordinance is a "criminal offense" in Colorado. *Geer v. Alanez*, 138 Colo. 177, 331 P.(2d) 269; *Canon City v. Merris*, 137 Colo. 169, 323 P.(2d) 614; *Zerobnick v. Denver*, 139 Colo. 139, 337 P.(2d) 11.

The power to arrest without warrant, as it pertained under the common law, may be constitutionally extended and broadened by statutory enactment. *Burroughs v. Eastman*, 101 Mich. 468, 59 N.W. 817; *Spurlock v. U. S.* (9th Cir., 1961), 295 F.(2d) 387. Illustrative is the enlargement of authority to arrest without warrant for violation of motor vehicle codes by state highway patrolmen. *Commonwealth v. Charles*, 114 Pa. S. 473, 174 Atl. 907.

Legislative enactments dealing with arrests without warrants are a proper exercise of the police powers of states and municipalities, since they are designed to promote public health, safety and morals; and, accordingly, their interpretation by the courts are to be gauged by state standards and policies (*U. . v. Bennett*, 209 F. Supp. 687; *Miller v. Texas*, 152 U.S. 512, 38 L.Ed. 534, 14 S.Ct. 675) under the established facts of the particular case. *Rescue Armg. et al. v. Municipal Court of Los Angeles, supra.*

Fortunately, the guideposts for the determination of the problem in the instant case have been supplied in

Walker v. Tucker, 131 Colo. 198, 280 P.(2d) 649, where it is stated:

> "Public policy, regardless of statute, requires and supports the maintenance of an authorized peace officer in an incorporated town. This is necessary for the maintenance of public safety, health and the preservation of property, and to hold that a peace officer, be he policeman, town marshal, constable or sheriff, must stand by and witness the violation of a town ordinance • • • and be impotent under the circumstances and permit an offender to do the damage and escape, maybe into parts unknown, without resisting the violation and apprehending the violator, would be a travesty upon justice and the police powers inherent in any municipal corporation. • • •
>
> "Ordinances such as are here involved are enacted for the preservation of peace, good order, and public convenience and protection of property rights. For a town or city to tolerate the destruction of its property because its duly authorized peace officers are unauthorized to stop the violation or apprehend the violator, until such a time as a warrant could be procured through the time-consuming processes, is unthinkable. The failure of our legislature to provide for such instances does not abrogate the inherent right of a municipality, or a town marshal, to discharge his full duty to prevent a violation of an ordinance as here involved, or to arrest any person violating same in his presence, and we believe, and so hold, that this ruling should apply even though the violation of the ordinance here involved does not amount to a breach of peace."

It is the position of the appellees that the lawfulness of the arrest of the appellants may be justified not only under the specific provisions of the challenged statute or ordinance, but also in accordance with the common law of the state, the authority inherent in the nature of the office of the appellees, and under the public policy, as expressed and announced in the *Walker* case, *supra*.

For the purposes of demonstration, we set out the determined facts, established by the Record and announced in the opinion of Mr. Justice Moore:

> "On the morning of March 10, 1958, Winston P. Boyer, who resides in Moab, Utah, together with his brother George T. Boyer and their uncle Roy E. Spicer, traveled from Denver to the Air Force Academy near Colorado Springs, Colorado. There by prearrangement they met a truck driver who had been engaged to do some hauling for them. Certain material was selected at the Academy which was to be used by Winston Boyer in a contemplated house building project at Moab, Utah. These four men spent the day in selecting the material which they desired and loaded it on the truck. Their labors were completed late in the afternoon, after which they all proceeded from the Academy to a weighing station, where they were delayed by authorities because of some overloading of the truck. The truck finally cleared the weighing station at about 7:00 P.M. The Boyers and Spicer then proceeded toward Denver via the Valley Highway in the Boyer sedan with George Boyer driving, and, arriving at Castle Rock they stopped for dinner at a restaurant with a connecting bar, at which time, before and during their meal, Winston and Spicer

each consumed three drinks of whiskey. George Boyer had two similar drinks before dinner, which he consumed within a period of fifteen minutes. Winston and Spicer consumed their drinks within forty minutes. They had arrived at Castle Rock at 8:00 P.M. and left for Denver at 9:30 P.M. They proceeded from Castle Rock toward Denver until they arrived at a tavern called the "Flame" where they stopped and each consumed an additional quantity of whiskey. The party then drove about twelve miles to Writer's Manor on South Colorado Boulevard in Denver where they arrived at approximately 11:30 P.M. Spicer wanted to cash a check but was disappointed in doing so because of the absence of a party he knew who he expected would approve his check. The three of them then proceeded into the bar where George admittedly attempted twice to serve himself by reaching over the bar in an effort to grab a bottle of liquor. George admits that on one such attempt he did in fact succeed in placing a small quantity of liquor in his coffee cup. According to the testimony of the bartender there were three attempts to take whiskey from behind the bar, and on each of the occasions George succeeded in getting an ounce or an ounce and one-half of whiskey.

Winston, George and Spicer were sitting at the west end of the bar which was tended by a Mr. Woodrow Wilson. Coffee was first served the Boyers and a whiskey highball to Spicer. After the Boyers consumed their coffee George reached over the bar for a bottle of liquor and according to Wilson began pouring some of its contents into the cup. The taking of any liquor at that time was disputed by the Boyers.

Wilson testified that George took about one and one-half ounces of liquor. It is the undisputed testimony of George that the 'bartender came over and took the bottle from me,' and said 'Leave the liquor alone.' The bartender replaced the bottle in the well back of the bar from where it was taken. George then left the bar and went to the coffee shop for more coffee. After consuming the second cup of coffee he again reached over the bar and took the same bottle. He admits that at that time he took a small amount of liquor. Again the bartender took the bottle away from him and according to Wilson he said to him, 'I want you to leave the liquor alone.' Wilson then reported those incidents to Carl Harthun, the other bartender who was also in charge of the place. Harthun exchanged stations with Wilson. Harthun again observed George reaching for the bottle and saw him again pour whiskey into his coffee cup. The Boyers deny taking any whiskey at that time; at any rate Harthun again took the bottle from George and told him: 'We serve the customers, the customers don't serve themselves.' George then left for another cup of coffee, followed by Harthun who said, 'I wish that you and your party would leave.' George's answer, according to Harthun, was: 'You damn bartenders won't give us any service, and we have to serve ourselves.' Harthun then went into the lobby and telephoned for police protection.

"After the conversation with Harthun, George again left the bar for a fourth cup of coffee and upon his return noticed two policemen talking with Harthun. These police officers were the plaintiffs Elkins and Bullock and were in full uniform. They had a

five minute conference with Harthun who related what had happened. The record shows that Elkins and Bullock then approached the Boyers; that they informed them that the management wanted them to leave and asked them to finish their coffee and go. The remarks of George and Winston to the officers can well be characterized as 'smart-alecky', insolent and somewhat defiant, and quite within the realm of what one might hear from an inebriate. During this time, although denied by the Boyers, one of them swung at Elkins, and Elkins started to remove them from the place, at which time the Boyers demanded to know what the charges were. The reply of the officers was that there were no charges as yet but there would be unless they left willingly. George Boyer had to be handcuffed, and ultimately, after a fight in which Elkins was kicked into unconsciousness and Bullock was knocked into insensibility, the two Boyers were subdued upon the arrival and with the help of several other policemen. One of the Boyers was placed in the patrol car and the other in another police cruiser and taken to the police station. There is an abundance of testimony that both Boyers were inebriated and fighting drunk, that they were loud, noisy, profane and were disturbing the peace in a public place. Elkins and Bullock were taken to the hospital, both with serious injuries."

It has been held that an offense is committed "in the officer's presence" when he is cognizant of an illegal activity by the use of his senses. *Harris v. State*, 216 Miss. 895, 63 S.(2d) 396; *Burgess v. People*, 170 Cal. App.(2d) 36, 338 P.(2d) 524. The use of an officer's senses includes reliance upon information supplied to him by another.

Draper v. U. S., 358 U.S. 307, 79 S.Ct. 329, 3 L.Ed.(2d) 327; *State v. Hoover*, 219 Ore. 288, 347 P.(2d) 69

The circumstances which give rise to an officer's action must be viewed entirely from his standpoint, as the facts then appear to him in the light of his experience and background as an officer. *Van Fleet v. West American Ins. Co.*, 5 Cal. App.(2d) 125, 42 P.(2d) 378; *Burton v. McNeill*, 196 S.C. 250, 13 S.E.(2d) 10; *Griffin v. State*, 200 Md. 569, 92 A.(2d) 743; *Goodwin v. State*, 149 Tenn. 47, 257 S.W. 80; *Forsythe v. Ivey*, 162 Miss. 471, 139 So. 615; *Coverstone v. Davies*, 38 Cal.(2d) 315, 239 P.(2d) 876.

The rule announced by this Court in *Draper v. U. S.*, *supra*, is as follows:

> "In dealing with probable cause, • • • as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. • • • Probable cause exists where 'the facts and circumstances within their (the arresting officers') knowledge and of which they had reasonably trustworthy information (are) sufficient in themselves to warrant a man of reasonable caution in the belief' that an offense has been or is being committed. • • •"

Preliminary to a tie-in of the facts with our position, we point up the common law requirement for arrest without warrant, as expressed by this Court in *Carroll v. U. S.*, 267 U.S. 132, 45 S.Ct. 280, 286, 69 L.Ed. 543:

> "In case of misdemeanor, a police officer, like a private person, has at common law no power of arrest-

ing without a warrant except when a breach of the peace has been committed in his presence or there is reasonable ground for supposing that a breach of peace is about to be committed or renewed in his presence."

It is apparent, if, as determined by Mr. Justice Moore, "there is an abundance of testimony that both Boyers were inebriated and fighting drunk, that they were loud, noisy, profane and were disturbing the peace in a public place" that their condition and conduct were obvious to the appellees through the simple use of their senses; and, accordingly, "criminal offenses", "misdemeanors", and "breaches of the peace" were, in truth and in fact, being committed, renewed and continued within their presence; and, by reason of the premises, every requirement and demand of the common law, the statute and ordinance, and the expressed public policy of the state were met. This being so, the decision and judgment of the Supreme Court of Colorado rests entirely on an adequate and complete non-federal basis.

II. THE PURPORTED CHALLENGE TO THE VALIDITY AND CONSTITUTIONALITY OF THE "ARREST - WITHOUT - WARRANT" STATUTE AND ORDINANCE WAS NOT TIMELY, PROPERLY OR ADEQUATELY RAISED.

Attention is called to the opinion of Mr. Justice Moore, reproduced as Appendix "A" to the Jurisdictional Statement, and particularly to pages 25 and 29 thereof, for the purpose of illustrating the sole and only assignments of error or specification of points urged by the appellants

in the Supreme Court of Colorado in their attempt to gain reversal of the judgments of the Trial Court. It will be noted that Mr. Justice Moore specifically quotes the assignments and grounds urged for reversal and meets and determines each of them in the opinion. For the purposes of this argument under this Subdivision II, we point up and call attention to the "Summary" of appellants' argument, as contained in their brief and reproduced herein as Appendix "2". The Summary of Argument is made mandatory by subdivision c(4) of Rule 115 of the Colorado Rules of Civil Procedure, Volume 1, page 113, *Colorado Revised Statutes*, 1953. Neither the pleadings, which frame the issues to be tried, nor the motions for new trial, nor the briefs of appellants, nor the oral arguments offered in support thereof made challenge, directly or indirectly, to the constitutionality of either the statute or the ordinance. We call attention to the fact, however, that in paragraph 1 of the appellants' Petition for Rehearing, for the first time in the proceeding, complaint is made with respect to the validity or constitutionality of the statute and ordinance. Incidentally, but significantly, Rule 118 of the Colorado Rules of Civil Procedure prohibits the appellees from making answer, either by brief or by argument, thereto.

Under this state of the Record, we respectfully suggest to the Court that it lacks jurisdiction to review the final judgment of the Supreme Court of Colorado. *Herndon v. Georgia*, 79 L.Ed. 1530, 295 U.S. 441, 55 S.Ct. 794. *Bloeth v. State of New York*, 82 S.Ct. 661, 369 U.S. 133, 7 L.Ed.(2) 780, sets forth the rule as follows:

> "It appears on the face of the present application that the two questions proposed for review were not raised in the Court of Appeals until the second motion

for reargument. In such circumstances, it is clear that this Court would be without jurisdiction to consider them."

See also *Radio Station WOW v. Johnson*, 326 U.S. 120, 128, 65 S.Ct. 1475, 1480, 89 L.Ed. 2092; *Hulbert v. City of Chicago*, 26 S.Ct. 617, 202 U.S. 275, 50 L.Ed. 1026; *Miller v. Texas, supra.*

Finally, we suggest that the Record in the instant case is absolutely void of the appellants' compliance with Rule 22 of the rules of the Trial Court, reproduced herein as Appendix "1". It is respectfully suggested that, for obvious reasons, strict compliance with the rule is prerequisite to a proper presentation of the issue to the trial and the appellate courts of Colorado.

III. THE SUPREME COURT OF COLORADO DID NOT EXPRESSLY PASS ON THE CONSTITUTIONALITY OF THE "ARREST-WITHOUT-WARRANT" STATUTE AND ORDINANCE.

The present application for review is bottomed upon Title 28 *U.S.C.* 1257(2), which provides that final judgments rendered by the highest court of a state may be reviewed by the Supreme Court when: "By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution • • • and the decision is in favor of its validity." Applications for appeals under the statute are conditioned, as this Court has stated in *Honeyman v. Hanan*, 300 U.S. 14, 57 S. Ct. 350, 81 L.Ed. 476, as follows:

"Before we may undertake to review a decision of

> the court of a state it must appear affirmatively from the record, not only that the federal question was presented for decision to the highest court of the state having jurisdiction, but that its decision of the federal question was necessary to the determination of the cause."

See also *Lynch v. New York, supra.* We believe it sufficient for the purposes of this argument to say that a physical examination of the opinion of the Supreme Court of Colorado, reproduced as Appendix "A" to appellants' Jurisdictional Statement, will reveal that the State Court did not expressly pass on the validity or the constitutionality of either the challenged "arrest-without-warrant" statute or ordinance; and, accordingly, the requirements of the statute by which appellants seek to invoke the jurisdiction of this Court have not been met. Indeed, as we have pointed up hereinabove, the decision could very well be based upon the common law of arrest, independent of the challenged legislation.

IV. THE CHALLENGE TO THE BODY EXECUTION STATUTE OF THE STATE OF COLORADO IS PREMATURE, RAISES NO JUSTICIABLE ISSUE, AND IS MOOT.

Reference is made, for the factual basis of this portion of the argument, to the Orders, issued by Mr. Justice Byron R. White on May 8, 1964, upon the application for stay of execution by the appellants. These Orders are reproduced as Appendixes "3" and "4" to the Motion to Dismiss. With respect to the appellant, Winston P. Boyer, the Order provides that he "is relieved from this filing of a bond, providing he immediately files in the Supreme

Court of Colorado an affidavit as to such inability and satisfies that Court as to the truth of said affidavit." As an alternative, it requires that this appellant file a surety bond in the sum of $30,000. Notwithstanding the Order, this appellant has wholly failed to supply the requisite affidavit or file the required bond. However, the Record is clear that he has not been in anywise subjected to the provisions of the challenged "body judgment" statute. Indeed, it is respectfully suggested that this particular appellant did, upon the order of the Trial Court, post with the Clerk of that Court his bond, secured by substantial real property situate in the State of Utah and corporate stock, the value of which remains undetermined. That bond is now in full force and effect.

With respect to George Boyer, the Order required that he post a surety bond in the sum of $35,000, subject to approval by the State Court. The Record here indicates that this appellant complied fully with the Order; and, accordingly, no writ of execution against his body has been issued. Under the circumstances, since the bond exceeds the amount of the judgments, interest and costs to be taxed, by the very terms of the statute and the order of the Trial Court issued thereunder, as well as the undertaking, his complaint of threatened imprisonment under the challenged statute will never come to pass. (See admissions at page 17 of Jurisdictional Statement.) As to the appellant, George Boyer, accordingly, the issue is moot.

As to the appellant, Winston Boyer, at the very most, it is premature. Especially is this true since he is, and at all times pertinent hereto, has been a resident of the State of Utah, where execution against his body under the Colorado statute cannot reach him. Accordingly, we respectfully suggest that, under the decisions of this Court,

this phase of the application for review raises no justiciable issue. See *Poe v. Ullman*, 367 U.S. 497, 6 L.Ed.(2d) 989, 81 S.Ct. 1752, where this Court announced that:

> "The best teaching of this Court's experience admonishes us not to entertain constitutional questions in advance of the strictest necessity. *Parker v. County of Los Angeles*, 338 U.S. 327, 333, 94 L.Ed. 144, 147, 70 S.Ct. 161. See also *Liverpool N. Y. & P. S. S. Co. v. Emigration Comrs.*, 113 U.S. 33, 39, 28 L.Ed. 899, 901, 5 S. Ct. 352.
>
> "The various doctrines of 'standing' 'ripeness' and 'mootness' which this Court has evolved with particular, though not exclusive, reference to such cases are but several manifestations — each having its own 'varied application' of the primary conception that federal judicial power is to be exercised to strike down legislation, whether state or federal, only at the instance of one who is himself immediately harmed or immediately threatened with harm, by the challenged action. *Sterns v. Wood*, 236 U.S. 75, 59 L.Ed. 475, 35 S.Ct. 229; *Texas v. Interstate Commerce Com.*, 258 U.S. 158, 66 L.Ed. 531, 42 S.Ct. 261; *United Public Workers v. Mitchell*, 330 U.S. 75, 89, 90, 91 L.Ed. 754, 766, 767, 67 S.Ct. 556."

Further, it is now respectfully suggested that it is fundamental that the power of the state to regulate or prescribe the procedure by which rights may be enforced and wrongs remedied is peculiarly a subject of state regulation and control and does not in anywise contravene either the Fifth or the Fourteenth Amendments to the Constitution of the United States. In this regard, we ask the Court to consider the following statement found in *The Constitution of The United States of America, Anno-*

tated, Government Printing Office, 1938 Edition, Official Printing of the Seventy-fourth Congress, Second Session, Document No. 232, published by the Legislative Reference Service, Library of Congress, page 912, as follows:

> "The due process clause of the Fourteenth Amendment does not control mere forms of procedure in the State courts or regulate practice therein. (*Holmes v. Conway*, 241 U.S. 624, 631; *Louisville & N. R. Co. v. Schmidt*, 177 U.S. 230, 236). The procedure by which rights may be enforced and wrongs remedied is peculiarly a subject of state regulation and control. In the exercise of that power and to satisfy a public need, a state may choose the remedy best adapted, in the legislative judgment, to protect the interests concerned, provided its choice be not unreasonable or arbitrary, and the procedure it adopts satisfy the constitutional requirements of reasonable notice and opportunity to be heard. (*Hardware Dealers Mut. F. Ins. Co. v. Glidden Co.*, 284 U.S. 151, 158). Or, in the language of Justice Cardozo, a state is free to regulate the procedure of its courts in accordance with its own conception of policy and fairness unless in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental. (*Snyder v. Massachusetts*, 291 U.S. 97, 105.)' * * * The Fourteenth Amendment in no way undertakes to control the power of a state to determine by what process legal rights may be asserted or legal obligations be enforced, provided the method or procedure adopted gives reasonable notice and affords fair opportunity to be heard before the issues are decided (*Iowa C. R. Co. v. Iowa*, 160 U.S. 389, 393; *Honeyman v. Hanan*, 302 U.S. 375).

> The limit of the full control which the State has in the proceedings of its courts, both in civil and criminal cases, is subject only to the qualification that such procedure must not work a denial of fundamental rights or conflict with specific and applicable provisions of the Federal Constitution. When the essential elements of a court having jurisdiction in which an opportunity for a hearing is afforded are present, the power of a state over its methods of procedure is substantially unrestricted by the due process clause of the constitution. (*Jordan v. Massachusetts*, 225 U.S. 167, 176.)"

V. CONCLUSION.

For the reasons hereinabove stated, it is respectfully submitted that the Motion to Dismiss is good and that the application for review should be denied. The statute and ordinance now the subject of challenge are, in every respect, valid and constitutional; the verdict of the jury and the judgments entered thereon by the trial and appellate courts of Colorado are, in every respect, in accordance with the law and the facts established; and, accordingly, we pray that the present proceeding be denied and dismissed and, if necessary, the judgments be, in all respects, affirmed.

Respectfully submitted,

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Appendix "1"

RULE 22

Notice of Claim of Unconstitutionality

(a) If, at any time prior to the trial of any proceeding a party attacks the validity or constitutionality of a municipal ordinance, franchise or charter provision of any Colorado municipality, that party shall promptly serve on either the municipality's attorney or its mayor copies of all pleadings filed in the action. Service may be made either by personal service or by certified or registered mail with return receipt requested.

(b) If, at any time prior to the trial of any proceeding, a party attacks the validity or constitutionality of any Colorado statute, or any rule or regulation of any state agency, that party shall promptly serve a copy of all pleadings on the attorney general of this state.

Appendix "2"

SUMMARY OF THE ARGUMENT

The trial court erred in failing to grant Defendants' (Plaintiffs in Error) Motion and Amended Motion for New Trial. The grounds stated in the Motion and Amended Motion for New Trial and relied upon by the Plaintiffs in Error (Defendants George and Winston Boyer) in seeking a reversal of the judgments against them, entered by the district court, are as follows:

I. The trial court erred in failing to submit to the jury the issues of whether or not Elkins and Bullock lawfully arrested George and Winston Boyer and whether or not George and Winston Boyer had a right to resist such arrests. The court erred in giving instructions Nos. 1, 7-11, 20 and 24, which, taken together, instructed the jury that the arrests were lawful and that the jury may find the Defendants guilty of malicious assault, and the court erred in failing to give Defendants' tendered instructions Nos. 1-9, inclusive, which instructions pertained to the legality of the arrests and the right of the Defendants to forcefully resist unlawful arrest. The court further erred in dismissing Defendants' counterclaims when there was an issue as to whether Plaintiffs Elkins and Bullock unlawfully arrested and imprisoned the Defendants.

A. Officers Elkins and Bullock acted in abuse of their authority and arrested George and Winston Boyer unlawfully. The arrests made without warrants were unlawful unless *in fact* crimes had been committed by George and Winston Boyer.

B. George and Winston Boyer had the right to resist the unlawful arrest with force.

C. The issue of whether or not George and Winston Boyer were lawfully arrested was for the jury's determination. There was sufficient conflict in the evidence on the issue of false arrest as to require that such controversial issue be submitted to the jury.

II. The damage verdicts returned by the jury were excessive and unreasonable in relation to the alleged injuries incurred by the Plaintiffs, were unsupported by the evidence, and bore no relation to *proximate cause.*

III. The Defendants were deprived of a fair trial by reason of improper opening statements on the part of Plaintiffs' counsel.

IV. Chapter 77, Article IX, Section 3, of the Colorado Revised Statutes, as applied to George and Winston Boyer deprives these Defendants of equal protection of the law as guaranteed to them by the United States Constitution.

Appendix "3"

SUPREME COURT OF THE UNITED STATES

No....., October Term, 1963

WINSTON P. BOYER, Appellant,

vs.

RICHARD L. ELKINS AND JAMES B. BULLOCK

ORDER

UPON CONSIDERATION of the application of counsel for the appellant and of the opposition of the appellees thereto,

IT IS ORDERED that the execution and enforcement of the judgments of the District Court for the City and County of Denver, State of Colorado, as affirmed by the Supreme Court of Colorado, be, and they are hereby stayed, pending the timely notation and perfection of an appeal to this Court from the Supreme Court of Colorado and of the final disposition of such appeal by this Court.

The application of counsel for the appellant alleges that in view of the appellant's financial position, he is unable to furnish bond to guarantee the payment of these judgments in the event of an affirmance of such judgments by this Court. Under these circumstances, the appellant is relieved from the filing of a bond provided he immediately files in the Supreme Court of Colorado an affidavit

as to such inability and satisfies that Court as to the truth of such affidavit. Should such an affidavit not be filed or if filed not meet with the approval of the Supreme Court of Colorado, then this stay is conditioned upon the posting and approval of a good and sufficient surety bond in the sum of Thirty Thousand Dollars ($30,000.00). Said bond is to be posted with and approved by the Supreme Court of Colorado, or a Judge thereof, and when so posted and approved, is to be filed with the Clerk of said Court.

/s/ BYRON R. WHITE
Associate Justice of the Supreme
Court of the United States

Dated this 8th
day of May, 1964.
(Seal)

Appendix "4"

SUPREME COURT OF THE UNITED STATES

No..... ....., October Term, 1963

GEORGE T. BOYER, Appellant,

vs.

RICHARD L. ELKINS AND JAMES A. BULLOCK

ORDER

UPON CONSIDERATION of the application of counsel for the appellant and of the opposition of the appellees thereto,

IT IS ORDERED that the execution and enforcement of the judgments of the District Court for the City and County of Denver, State of Colorado, as affirmed by the Supreme Court of Colorado, be, and they are hereby stayed, pending the timely notation and perfection of an appeal to this Court from the Supreme Court of Colorado and of the final disposition of such appeal by this Court. Such stay is conditioned upon the posting and approval of a good and sufficient surety bond in the sum of Thirty-five Thousand Dollars ($35,000.00). Said bond is to be posted with and approved by the Supreme Court of Colorado, or a Judge thereof, and when so posted and approved, is to be filed with the Clerk of that Court.

/s/ BYRON R. WHITE
Associate Justice of the Supreme
Court of the United States

Dated this 8th
day of May, 1964.
(Seal)

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FILED
OCT 5 1964
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1964

No. 438

WINSTON P. BOYER and GEORGE T. BOYER,
Appellants,

v.

RICHARD L. ELKINS and JAMES A. BULLOCK,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF COLORADO

APPELLANTS' BRIEF IN OPPOSITION TO MOTION TO DISMISS

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ON APPEAL FROM THE SUPREME COURT OF THE STATE OF COLORADO

APPELLANTS' BRIEF IN OPPOSITION TO MOTION TO DISMISS

This Brief is filed in opposition to Appellees' Motion to Dismiss the Appeal.

The Appellants, Winston P. Boyer and George T. Boyer, hereinafter called the "Boyers," assert that the Colorado arrest statute and the Colorado body judgment statute violate the federal Constitution. The Appellees base their Motion to Dismiss the Appeal with respect to the arrest statute principally on two grounds: one, the decision of the Colorado Supreme Court rests on an ade-

quate non-federal ground and, two, that the constitutional issue was not timely raised nor was it considered by the Colorado court.

The Motion to Dismiss the Appeal with respect to the body judgment statute is predicated on the proposition that the appeal is premature because execution against the body of Winston P. Boyer has not been effected and may never be effected if he remains without the State of Colorado.

1. THE DECISION AND JUDGMENT OF THE COLORADO SUPREME COURT RESTS SOLELY ON A STATUTE REPUGNANT TO THE FEDERAL CONSTITUTION.

The Colorado arrest statute, Chapter 39, Article 2, Section 20, of the Colorado Revised Statutes, 1953, Permanent Supplement, provides:

> "Any provision of this chapter prior to the effective date of this section to the contrary notwithstanding, an arrest may be made by an officer or by a private person without a warrant, for a criminal offense committed in his presence; and by an officer when a criminal offense has in fact been committed, and he has reasonable ground for believing that the person to be arrested has committed it."

This statute, it is submitted, violates the Fourth and Fourteenth Amendments to the United States Constitution because it permits an arrest for a misdemeanor not committed in the presence of the arresting officer. The Appellees claim that the arrest of the Boyers was made for crimes committed in their presence, and the decision of

the Colorado Supreme Court is therefore supported by non-federal grounds.

If the Colorado Supreme Court had delivered no opinion, or if the opinion rested on two grounds, one involving a federal question and the other not, then the Appellees' claim might have merit, *Lynch* vs *People of New York ex rel. Pierson*, 293 U. S. 52. But the Colorado Supreme Court did deliver an opinion and did rest the decision on only one ground — the arrest statute is lawful because a criminal offense had been committed before the arrival of the officers, and the officers had reason to believe that the Boyers committed it. Moreover, by its opinion, and in conformance with the ruling of the trial court, a jury has been precluded from determining if any offense had in fact been committed.

In its opinion, which is set forth in Appendix A to the Jurisdictional Statement, the Colorado Supreme Court quotes the statute, emphasizing the clause that provides: " . . . *and by an officer when a criminal offense has in fact been committed, and he has reasonable ground for believing that the person to be arrested has committed it.*" (emphasis that of the Colorado Supreme Court, p. 26, Jurisdictional Statement) Then, in the language of the statute, the Colorado Supreme Court holds the arrests to be lawful:

> "We hold, under the facts disclosed by this record, that as a matter of law the defendants had committed a criminal offense or offenses, and that as a matter of law the plaintiffs had reasonable ground for believing that the defendants had committed such offense or offenses." (p. 27, Jurisdictional Statement)

The Colorado Supreme Court also noted that the arrests were made after the officers had a "five-minute conference with Harthun, who related what had happened." (p. 24 of Jurisdictional Statement)

Since the Colorado Supreme Court explicitly based its decision solely upon a ground repugnant to the federal Constitution, the United States Supreme Court should review the case, even though the state court might have based its decision on other adequate non-Federal grounds. *Steele vs. Louisville and Nashville R. Co.*, 323 U.S. 192, 197, n. 1; *Indiana ex rel Anderson vs. Brand*, 303 U.S. 95, 98; *International Steel Company vs. National Surety Company*, 297 U.S. 657, 666.

II. PROTECTION OF THE UNITED STATES CONSTITUTION WAS SEASONABLY INVOKED.

When a constitutional privilege has been denied for the first time by a ruling made on appeal, a litigant may challenge the unexpected ruling by a motion for rehearing, and the challenge will be timely. This is true even though the petition for rehearing is summarily denied without reference to the federal question. *Missouri vs. Gehner*, 281 U.S. 313; *Brinkerhoff-Faris Trust and Savings Company vs. Hill*, 281 U.S. 673.

The Boyers' constitutional rights were denied for the first time when the Colorado Supreme Court ignored the issue before it and held as a matter of law that the arrests were lawful on the grounds that a crime had been committed by the Boyers outside the presence of the officers.

The Boyers' tendered instructions (R. 1274-1276),

particularly Instruction No. 8, which were refused by the trial court, instructed the jury to determine whether or not a crime had been committed in the presence of the officers. The Boyers urged before the Colorado Supreme Court that it was error not to give these instructions. The Colorado Supreme Court, instead of determining whether or not this issue of fact should have been presented to the jury, held that as a matter of law the arrests were lawful, not because a crime had been committed in the presence of the officers, but because a crime had been committed outside the presence of the officers and the arresting officers had reason to believe that the Boyers committed it. It was not until the Colorado Supreme Court applied the clause of the arrest statute, now challenged, that the constitutional issue arose.

The trial court ignored the issue of whether or not the arrests were lawful. The Boyers urged on appeal that their instructions concerning whether a crime had been committed in the presence of the officers should have been given. But the Colorado Supreme Court did not consider the part of the arrest statute that permits an officer to arrest "for a criminal offense committed in his presence," being the part upon which the Boyers' tendered instructions rest. When for the first time in the case the court held that the arrests were justified on a ground the Boyers assert is repugnant to the United States Constitution, they promptly raised their objection in the Petition for Rehearing. (App. B, Jurisdictional Statement)

It would have been premature to raise the constitutional issue, before the repugnant clause of the arrest statute was applied to the Boyers. As noted in the Appellees' Brief, "The best teaching of this Court's experi-

ence admonishes us not to entertain constitutional questions in advance of the strictest necessity." *Poe vs. Ullman*, 367 U.S. 497, p. 503.

Appellees also urge that the claim of unconstitutionality was not made, pursuant to Rule 22 of the local rules of the trial court. Rule 22 is set out in the appendix to the Appellees' Brief. This rule provides that if a constitutional issue is raised prior to trial, notice must be given to the Attorney General. It is silent as to the procedure for raising constitutional issues after the trial, and, of course, being a rule of the trial court, has no bearing on raising constitutional issues before the Colorado Supreme Court. As held in *Mountain States Telephone & Telegraph Company vs. Animas Mosquito Control District*, 15 Colo. Ad. Sheets No. 13, p. 246, 380 P.2d 560 (1963), a constitutional issue may be raised and passed on for the first time by the Colorado Supreme Court, even though it is raised by the court itself and not urged or suggested by the parties before it.

> "Counsel for all parties urged that courts should consider only questions presented and the constitutionality of an act should be considered only at the instance of an aggrieved party.
>
> "Though generally it is not considered good practice for courts to resolve cases on grounds not urged by the parties or their counsel, yet in cases such as we have before us, when much of the argument revolves around which of two words and meanings the legislature intended, and which by either interpretation reveals legislation that is patently unconstitutional and void, and under which many persons are receiving unfair, discriminatory and unlawful treatment, it is

the duty of the courts to resolve the question to the end that the citizens may not be deprived of their constitutional rights. To ignore the question of the constitutionality would be to permit the perpetration of mischief spawned by this invalid provision for exclusion." id at 380 P.2d 562, 563.

III. THE BODY JUDGMENT STATUTE MAY BE CHALLENGED BY WINSTON P. BOYER BEFORE HE IS IMPRISONED.

As set forth in Appendix A to the Jurisdictional Statement, the trial court ordered that the plaintiffs have execution against the bodies of the defendants for a period not to exceed one year, or until further order of the court, or until the amount of the judgment has been paid. George Boyer has posted a surety bond in the amount of $35,000.00, to prevent such execution against him. Winston Boyer, however, has not posted such an appeal bond and execution may issue against him at any time, and, if he is found within the State of Colorado, he is subject to imprisonment for a year.

Winston Boyer should not have to wait until he is imprisoned in order to perfect his appeal. If this were the law, his imprisonment would be over long before a final determination was made on appeal, and, of course, the question would then be moot. Certainly, in a criminal proceeding, the defendant who is found guilty by the trial court need not be actually in the penitentiary before he can commence an appeal, and similarly a defendant in a civil action need not wait until he has paid the judgment before appealing.

This Court has previously granted certiorari to review the constitutionality of the New York body judgment statute, when it did not appear from the record that the appellant was in fact imprisoned, *Gotthilf vs. Sills*, 372 U.S. 957. (This writ was later dismissed when it was found that there was not a final determination by the New York courts, 375 U.S. 79).

CONCLUSION

It is submitted that the Appellees' Motion to Dismiss the Appeal should be denied, and that this Honorable Court should take jurisdiction and grant the appeal herein.

Respectfully submitted,

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